



National Security Personnel System Talking Points on Major Changes to NSPS Regulations October 2005

A number of changes have been made to the NSPS proposed regulations as a result of the 58,000 comments received during the public comment period and input from the unions during the statutory meet and confer period. Some of the changes are technical in nature, but there are several substantive changes as well. Changes reflect input from employees, supervisors, the general public and our employee unions.

Labor Relations

Collective Bargaining – unions concerned they are losing collective bargaining rights under NSPS

- The final regulations preserve the right to bargain collectively but strike an appropriate balance between employee interests and mission imperatives.
- In response to concerns raised by the unions, we have revised the regulations to permit collective bargaining on a variety of operational matters if the Secretary determines that bargaining would advance the Department's mission accomplishment or promote organizational effectiveness. Such matters include employee hours of work, safety and health policies, overtime assignments, or temporary duty assignments to alternative work or locations.
- We have also addressed additional union concerns that any management official could restrict the scope of bargaining by simply issuing policy on any matter. The final regulations limit which officials may issue policy on issues outside the duty to bargain (Secretary, Deputy Secretary, Principal Staff Assistants, and Secretaries of the Military Departments only). No policy will be issued for the sole purpose of overriding a collective bargaining agreement.
- These revisions meet the Department's mission needs and are consistent with the NSPS statute's intent to preserve collective bargaining rights.
- The requirement to bargain over the impact of management actions for adversely affected employees is retained in the final regulations.

Unions expressed concern that **implementing issuances** (Department instructions that deal only with NSPS implementation) are not subject to collective bargaining.

- Unions can participate in the development of implementing issuances through continuing collaboration and will, as a result, have the opportunity to participate in Department planning on a wider range of topics than is allowable through current collective bargaining rights.

National Security Labor Relations Board – concerns raised whether the NSLRB will function as an independent review board.

- The final regulations ensure that the NSLRB will function as an independent review board over labor disputes in the Department.
- As a result of meet and confer, DoD and OPM have committed to the unions that the Secretary will consider union recommendations for two of the Board members. This adds transparency to the process and provides the unions an opportunity to influence Board membership.
- The final regulations continue to require that the board members be appointed to fixed terms with a very limited basis for removing any board member.
- The criteria for removing NSLRB members are, by design, very stringent. In fact, they are the same as those that apply to FLRA and MSPB members. The intent is to make removal of such individuals difficult, in order to preserve their independence.
- Finally, NSLRB decisions are subject to review by the Federal Labor Relations Authority (FLRA) and judicial review. FLRA, an existing independent third party, will act as another element of independent third party review.

Appeals

Mitigation of adverse action penalties – concern raised that the proposed regulations provide a penalty determination standard of review inconsistent with law

- The proposed rules do tighten the standard under which MSPB (and private arbitrators) may mitigate adverse action penalties, providing greater deference to

management officials, as MSPB judges and private arbitrators often relegate mission impact to a minor consideration.

- Objective is to ensure that the Department's judgment on penalty determinations is given proper deference. DoD bears full accountability for national security and is in the best position to determine the most appropriate adverse action for unacceptable performance or misconduct.
- In response to concerns raised by the unions, we have revised the final regulations to change the mitigation standard from "wholly without justification" to a standard similar to that recognized by Federal Circuit Courts. New standard will still make mission impact a primary consideration that MSPB AJs and arbitrators must consider.

Human Resources

Performance Management

- Employees and unions expressed concern that performance expectations be communicated in writing; we agreed and the regulations have been revised accordingly
- Unions wanted employees to be able to use negotiated grievance procedures to challenge performance ratings; the regulations have been modified to allow bargaining unit employees to use either negotiated grievance procedures or the Department administrative reconsideration process.

Pay Setting

- Unions proposed that the Department establish a minimum six percent pay increase for promotions. The regulations were revised to include this.
- Unions recommended that the Department limit the number of times an employee's pay could be reduced due to performance or conduct issues. The regulations were revised to limit the number of these reductions to no more than one per year.

Workforce Shaping

- Employees and unions suggested that the Department not use a single performance rating of record to determine an employee's retention standing in reduction in force. The regulations will reflect the use of more than one year's ratings in making reduction in force decisions.
- Unions expressed concern about probationary period employees displacing other employees. The regulations were modified to prevent this.